

LFC Requester:**Caroline Malone**

**AGENCY BILL ANALYSIS
2016 REGULAR SESSION**

WITHIN 24 HOURS OF BILL POSTING, EMAIL ANALYSIS TO:

LFC@NMLEGIS.GOV

and

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{Include the bill no. in the email subject line, e.g., HB2, and only attach one bill analysis and related documentation per email message}

SECTION I: GENERAL INFORMATION

{Indicate if analysis is on an original bill, amendment, substitute or a correction of a previous bill}

Check all that apply:

Original X **Amendment**
Correction **Substitute**

Date 1/20/2016

Bill No: HB 123

Sponsor: Rep. William Rehm

Agency Code: 305

Short Title: DRIVER'S LICENSE & REAL

Person Writing Joshua R. Granata

ID ACT COMPLIANCE

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SECTION II: FISCAL IMPACT

APPROPRIATION (dollars in thousands)

Appropriation		Recurring or Nonrecurring	Fund Affected
FY16	FY17		

(Parenthesis () Indicate Expenditure Decreases)

REVENUE (dollars in thousands)

Estimated Revenue			Recurring or Nonrecurring	Fund Affected
FY16	FY17	FY18		

(Parenthesis () Indicate Expenditure Decreases)

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY16	FY17	FY18	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
Total						

(Parenthesis () Indicate Expenditure Decreases)

Duplicates/Conflicts with/Companion to/Relates to:
Duplicates/Relates to Appropriation in the General Appropriation Act

N/A

SECTION III: NARRATIVE

BILL SUMMARY

This analysis is neither a formal Attorney General's Opinion nor an Attorney General's Advisory Letter. This is a staff analysis in response to an agency's, committee's, or legislator's request.

Synopsis:

House Bill 123 ("HB 123") is an act which amends the Motor Vehicle Code, NMSA 1978, Sections 66-1-1 to -8 in order to comply with the requirements of the federal REAL ID Act of 2005 ("REAL ID"). The proposed act would create two tiers of driver's licenses and identification cards—one tier would be composed of state issued driver's licenses and identification cards which comply with REAL ID, while the second tier would be composed of state issued driver's licenses and identification cards which do not comply with REAL ID. The proposed act would require the fingerprinting and conducting of background investigations of applicants for driver's license and identification cards that do not meet the requirements of REAL ID. The proposed act also provides for the exchange and cancellation of certain driver's licenses and identification cards that do not comply with HB 123. The proposed act increases penalties for violations related to driver's licenses and identification cards as well as creates new criminal penalties. Lastly, the proposed act declares an emergency to allow for immediate implementation of this proposed act.

Sections 1 and 2

HB 123 amends the definitions under Sections 66-1-4.4 and 66-1-4.10 under the Motor Vehicle Code as follows:

1. The term "driver's card" is added to mean "a card not intended to be accepted by federal agencies for official purposes issue" which, nevertheless, allows a person to operate a motor vehicle under the laws of New Mexico.
2. The term "driver's license" is amended by the addition of language indicating that the driver's license differs from the "driver's card" in that it "meets the federal requirement to be accepted by federal agencies for official federal purposes."
3. The term "lawful status" is added to mean "the legal right to be present in the United States, as that phrase is used in the federal Real ID Act of 2005."
4. The term "license" is amended by removing reference to "temporary instruction" and

“temporary license” and adding the term “card” so that “license” means “any license, permit or card ...pertaining to the authorizing of persons to operate motor vehicles” as recognized under the laws of New Mexico.

Section 3

HB 123 amends the application requirements to operate a motor vehicle under Sec. 66-5-9. The term “driver’s card” is added to subsection A in addition to language providing for the renewal of instruction permits, provisional licenses, driver’s licenses or driver’s cards. The application must contain the applicant’s full legal name; removes the provision allowing for an individual tax identification; requires a current NM residence address; removes language referencing foreign nationals; and provides that the secretary shall promulgate regulations to clarify which documents may be accepted as “evidence of residency of the applicant.” Additionally, the applicant for a new license, or a renewal, is required to provide “documentation required by the federal government of the applicant’s identity, date of birth, social security number, if applicable, address of current residence and lawful status.” The department is responsible for verifying the information provided by the applicant.

As proposed, a person with “lawful status” cannot apply for a driver’s card. However, an applicant who is otherwise qualified for a driver’s license, but who does not provide proof of lawful status, shall be issued a driver’s card. The proposed act adds provisions for a foreign national with lawful status to apply for a driver’s license subject to explicit limitations, including term of validity of license.

HB 123 provides for what documents are considered acceptable proof of an applicant’s identity when an application for a driver’s card is made: (1) an individual tax identification number; (2) passport; (3) valid NM license; and (4) a document that the secretary has authorized.

Section 4

In addition to amending the requirements of the information required on the license, HB 123 amends Sec. 66-5-15 to “ensure that driver’s licenses and driver’s cards are distinguishable in color and design.” A driver’s license issued to a foreign national, under certain circumstances will be labeled “TEMPORARY”. Additionally, a driver’s card shall state on the card: “FOR DRIVING ONLY. NOT VALID FOR FEDERAL IDENTIFICATION OR VOTER REGISTRATION.”

Section 5

This section amends Sec. 66-5-21 to provide for the expiration of the driver’s card and driver’s license. Additionally, this section addresses remote or non in-person renewal by providing that “the department shall not renew by mail or telephonic or electronic means a license if prohibited by state or federal law or regulation.”

Section 6

This section amends Sec. 66-5-37 the unlawful use of a license or driver’s card—including both misdemeanor and felony offenses.

Section 7

This section amends Sec. 66-5-47 to require a photograph or reproduction of the likeness of all persons shall be a “full-face or front-view digital photograph.” Additionally, the subsection requiring an applicant to provide evidence of the applicant’s age is struck.

Section 8

This section amends Sec. 66-5-401 regarding identification cards. Importantly, this section creates two distinct forms of identification: one that meets federal REAL ID requirements, and one that does not. Additionally, this section prescribes what information is to be contained in the application for such cards.

Section 9

This section amends Sec. 66-5-402 in order to delineate who is eligible for identification cards: (1) a person who is a NM resident, and (2) who does not have a valid NM license.

Section 10

This section amends Sec. 66-5-403 regarding the duration and renewal of identification cards.

Section 11

This section amends Sec. 66-5-405 regarding the contents of the identification cards. Importantly, identification cards that are not REAL ID compliant shall bear the statement: “ISSUED FOR IDENTIFICATION PURPOSES ONLY. NOT VALID FOR FEDERAL IDENTIFICATION OR VOTER REGISTRATION.” Additionally, under circumstances when an identification card issued to a foreign national bears the statement “TEMPORARY” this statement is to be located “in the machine readable zone”.

Section 12

This section amends Sec. 6-5-409 to make a misdemeanor offense when a person “make[s] or permit[s] any unlawful use of the identification card”. Also, for a felony offense, the mental state of “knowingly or willfully” is added to the elements of the crime of providing a false or fictitious name, or document, in an application for an identification card. Additionally, to “induce or solicit another person, or conspire with another person” to violate the above subsection is also a felony offense.

Section 13

This section amends Sec. 66-8-1.1 to seemingly limit the application of this section to department employees, private retail agents or other contractors of the department. Previously, this section applied to “any person”.

Section 14

This is a new section which requires the department to promulgate rules regarding the fingerprinting and conducting of background investigations of applicants for driver’s cards and identification cards that are not REAL ID compliant.

Section 15

This is a new section which provides for the mandatory cancellation of licenses and identification cards issued to persons without lawful status. This section outlines the due process consideration for procedures when the department cancels licenses and identification cards pursuant to this section.

Section 16

This is a new section which provides for the department to promulgate rules regarding the issuance of documents that meet federal requirements.

Section 17

This is a new section which declares and emergency: “It is necessary for the public peace, health and safety that this act take effect immediately.”

FISCAL IMPLICATIONS

N/A

SIGNIFICANT ISSUES

HB 123 proposes to amend the Motor Vehicle Code in order to comply with the REAL ID Act of 2005, Pub. L. No. 109-13, 119 Stat, 231m 312 (May 11, 2005).

REAL ID requires that the United States Department of Homeland Security (“DHS”) implement the Act; and although DHS has not fully implemented the Act at this time, full implementation of the law is scheduled for early 2018. Also, piecemeal implementation of the law in the interim is permitted (e.g., White Sands Missile Range no longer accepts New Mexico-issued licenses for access to that facility). Under REAL ID, states must comply with all substantive provisions of the federal law to achieve “full compliance.” 6 C.F.R. § 37.51 (2015).

For a state-issued document to be acceptable for federal purposes, all REAL ID provisions must be satisfied. “Any driver’s license or identification card issued by a State that DHS determines is not in full compliance...is not acceptable as identification by Federal agencies for official purposes.” 6 C.F.R. § 37.65(a).

Section 3. HB 123, as proposed, may not comply with REAL ID. For example, 6 C.F.R. Section 37.11(a) mandates that each person applying for a REAL ID complaint ID must be subject to a “mandatory image capture” and that the state must “maintain photographs of individuals even if no card is issued...stored in a format in accordance with [REAL ID’s source document retention requirements.”

Also, 6 C.F.R. Section 37.11(b) requires that “[e]ach applicant must sign a declaration under penalty of perjury that the information on the application is true and correct....”

Section 3(B), p. 7, ln. 25–p. 8, ln 1-3: requires that “[t]he department shall verify the applicant’s lawful status and social security number, if applicable through a method approved by the federal government.” This appears to refer to the federal requirement of verification, see 6 C.F.R. Section 37.13, but Section 31.13 requires that “States verify the documents and information under §31.11 with the issuer of the document.”

It is possible that these shortcomings could be clarified by regulation, but HB 144 contains no provision that complies with the federal mandate regarding the photograph and declaration that must be part of an application under REAL ID.

Section 4 prescribes the information required to be produced on the both driver’s licenses and

driver's cards, including in Subsection (D) that "[a] driver's card shall bear the statement: FOR DRIVING ONLY. NOT VALID FOR FEDERAL IDENTIFICATION." REAL ID allows that a state may issue "driver's licenses and identification" that is not REAL ID compliant, but that those must "[c]learly state on their face and in the machine readable zone that the card is not acceptable for official purposes." See 6 C.F.R. § 37.71(a)(1). HB 144 does not require the placement of its equivalent statement in both locations on the driver's card (the non-REAL ID complaint document authorizing operation of a motor vehicle). Although Subsection (B) required that the driver's licenses be distinguishable in color and design, HB 144 does not require that driver's licenses issued comply with the security features required for driver's licenses under REAL ID. See 6 C.F.R. § 37.15. Also, HB 144 does not contain a provision that clearly requires that "machine readable technology" be part of the driver's license, which is required under REAL ID. See 6 C.F.R. § 37.19.

Section 8 provides application requirements for a state-issued identification card. It is not clear if the application requirements imposed by Section 8 comply with REAL ID for the same reasons stated in the discussions of Sections 3(B) and (E), see above.

Section 14 provides for the department to adopt and implement rules regarding fingerprinting and conducting background investigations of applicants for driver's cards and identification cards not in compliant with REAL ID. This section raises concerns that it may potentially run afoul of state and federal constitutional provisions that demand equal treatment of people by the government. See below.

Although many of the issues may be within the Taxation and Revenue Department's scope of rulemaking authority, more clarity within the text of the legislation could clarify the Legislature's intent, minimize uncertainty, and provide clear authority to promulgate the necessary and appropriate regulations.

PERFORMANCE IMPLICATIONS

None

ADMINISTRATIVE IMPLICATIONS

None

CONFLICT, DUPLICATION, COMPANIONSHIP, RELATIONSHIP

House Bills 94, 99, 123 and 144 relate to the issuance of New Mexico driver's licenses and identification cards in an effort to comply with the federal REAL ID Act.

TECHNICAL ISSUES

None

OTHER SUBSTANTIVE ISSUES

Because the legislation may result in the enactment of distinctions in legal rights based upon the alienage (or nationality) of the applicant, it potentially runs afoul of state and federal

constitutional provisions that demand equal treatment of people by the government. See N.M. Const. Art. II, § 18; U.S. Const. amend. XIV; see generally Alexander L. Mounts, Note, A Safer Nation? How Driver's License Restrictions Hurt Immigrants & Noncitizens, Not Terrorists, 37 Ind. L. Rev. 247 (2003). It is well-settled that non-citizens enjoy constitutionally-granted equal protection rights. See Yick Wo v. Hopkins, 118 U.S. 356, 369 (1886). In New Mexico, where the people are afforded heightened constitutional equal protection rights, disparate treatment of a disfavored group potentially gives rise to especially searching scrutiny by the judiciary. See, e.g., Breen v. Carlsbad Mun. Schools, 2005-NMSC-028, 138 N.M. 331.

The courts are especially skeptical of government actions which withdraw existing rights from such disfavored groups. See Romer v. Evans, 517 U.S. 620 (1996); Perry v. Brown, 671 F.3d 1052, 1079-1080 (9th Cir. 2012). HB 94 would almost certainly have the effect of preventing certain currently licensed foreign national motorists from maintaining driver's licenses, especially those unable to establish two years of presence in the State, or other criteria imposed on such applicants. If the courts of New Mexico or the United States find that legislation affronts basic constitutional protections, it will be invalidated. See, e.g., Griego v. Oliver, 2014-NMSC-003.

Twelve states, the District of Columbia and Puerto Rico give their residents access to driver's licenses without regard to immigration status. Those other State laws may call into question the extent to which there will ultimately be full enforcement of the REAL ID Act.

ALTERNATIVES

None

WHAT WILL BE THE CONSEQUENCES OF NOT ENACTING THIS BILL

Status Quo. Residents of states that fail to comply with REAL ID will ultimately be unable to utilize their state-issued identification cards to board airplanes, enter federal buildings, or for a range of other "official [federal] purposes." REAL ID Act of 2005, Pub. L. No. 109-13, 119 Stat. 231, 312 (May 11, 2005). New Mexico is currently in the process of complying with the terms of REAL ID, but many of the state's provisions governing the issuance of driver's licenses and identification cards remain inconsistent with the requirements of the federal law. On the other hand, reportedly 25 States have enacted laws expressly prohibiting compliance with the REAL ID Act, so it may still be an open question as to when, and if so, how effectively, the federal government will proceed to enforce the REAL ID Act as currently provided.

AMENDMENTS

None